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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN and the CITY COUNCIL OF ASPEN,

Respondents.

Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF FOR RESPONDENTS CITY OF ASPEN and CITY COUNCIL OF ASPEN

EDWARD M. CASWALL*
Special Counsel
2350 Colorado State
Bank Building
1600 Broadway
Denver, Colorado 80202
Telephone: 303-894-8191

JOHN P. WORCESTER
City Attorney
City of Aspen
130 South Galena Street
Aspen, Colorado 81612
Telephone: 970-920-5055

Attorneys for Respondents City of Aspen and City Council of Aspen

*Counsel of Record

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QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in ruling that the Equal Protection Clause of the Fourteenth Amendment prohibits the implementation of a voter-approved amendment to the Colorado Constitution that mandates the exclusion of a specifically identified and targeted minority from participation in the normal processes of government on an equal basis with other citizens.

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OPINIONS BELOW

The pertinent opinions of the Colorado Supreme Court are reported at 882 P.2d 1335 (Colo. 1994) (on the merits) and 854 P.2d 1270 (Colo. 1993) (preliminary injunction). (See Pet. App. B and D, respectively.) The pertinent opinions of the trial court are not reported, but may be found at Pet. App. C (on the merits) and E (preliminary injunction), respectively.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, §30b of the Colorado Constitution provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This

Section of the Constitution shall be in all respects self-executing.

STATEMENT OF THE CASE

This case once again raises the important and historically difficult question of how to balance and protect the public good and rights of a minority against the passion and weight of a majority while at the same time preserving the form and spirit of popular government as envisioned and established under the Constitution. In providing a partial response to this question, the Colorado Supreme Court held below that all citizens have a fundamental right to participate in the normal processes of government on an equal basis and that such right is protected by the Equal Protection Clause of the Fourteenth Amendment. Because the citizen-initiated amendment to the Colorado Constitution involved in this appeal infringes upon that right, the measure was found to be unconstitutional.

Proceedings Below

On November 28, 1977, the City of Aspen adopted a comprehensive anti-discrimination ordinance prohibiting invidious discrimination in employment, housing and public accommodations within the city, including discrimination based upon affectional or sexual orientation. Aspen, Colo., Mun. Code §13-98 (1977). On November 3, 1992, a majority of the Colorado electorate passed a statewide ballot proposal commonly known as "Amendment

2"[1] which is intended to amend the Colorado Constitution so as to effect an immediate repeal of §13-98 of the Aspen Municipal Code and all other state and local legislative, regulatory and administrative anti-discrimination measures protecting homosexual, lesbian, or bisexual citizens from invidious discriminatory acts. In addition to nullifying existing legislation and regulations, Amendment 2 also has the objective of stripping elected officials at all levels of government of their discretion and authority to adopt future anti-discrimination measures protecting gay and bisexual people regardless of how harmful or widespread the discrimination may be.

Given its duty under the Supremacy Clause to insure against violations of federal constitutional rights,[2] Aspen joined with several parties in initiating litigation in state court challenging the validity of Amendment 2. After a four-day hearing, the trial court preliminarily enjoined the enforcement of the amendment, concluding that the measure infringed upon a fundamental right and was likely unconstitutional. Petitioners herein appealed the injunction to the Colorado Supreme Court, which affirmed. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) ("*Evans I*") (Pet. App. D). In sustaining the injunction, the court found that the right of citizens to participate in the processes of government is a core democratic value and that the opportunity to participate on an equal basis in such processes constituted a fundamental constitutional right guaranteed by the Equal Protection Clause. *Evans I*

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[1] Colo. Const. art. II, §30b.

[2] *See Missouri v. Jenkins*, 495 U.S. 33, 57 (1990); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

(Pet. App. at D-9 and D-10). The court further held that inasmuch as Amendment 2 mandated a restructuring of political and governmental processes for the purpose of imposing singular disadvantages and burdens upon homosexuals, lesbians and bisexuals, the amendment, to a reasonable probability, infringed upon the right of citizens to participate equally in the political process and must, therefore, be subject to strict judicial scrutiny. *Evans I* (Pet. App. at D-25 to 27). The matter was thereafter remanded to the district court for a trial on the merits, including a determination of whether Amendment 2 was narrowly tailored in support of a legitimate and compelling governmental interest. Petitioners sought *certiorari* review of the Colorado Supreme Court's decision before this Court, which was denied on November 1, 1993. *Romer v. Evans*, ___U.S.___, 114 S.Ct. 419 (1993).

Trial was conducted before the state district court on October 12-22, 1993. The evidence and record developed before the court at the earlier hearing on preliminary injunctive relief were incorporated into the trial record. On December 13, 1993, the trial court entered a written order permanently enjoining the enforcement of Amendment 2, ruling that the measure was not narrowly tailored in support of a legitimate and compelling state interest and violated guarantees to the equal protection of the law as provided under the Constitution of the United States. On February 4, 1994, petitioners sought review of the district court's decision before the Colorado Supreme Court which, after *de novo* review, affirmed the trial court's analysis and findings and the entry of the permanent injunction. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) ("*Evans II*") (Pet. App. B). This Court granted *certiorari*

review of the Colorado Supreme Court's decision on February 21, 1995.

Statement of Facts

On November 28, 1977, the City Council for the City of Aspen adopted and codified at §13-98 of the Aspen Municipal Code a comprehensive anti-discrimination ordinance prohibiting discrimination in employment, housing, and public accommodations within the city, including discrimination on the basis of sexual orientation. (I:216 and VII:148.)[3] The ordinance prohibits discrimination against both heterosexual and homosexual individuals. *Id.* The prohibitions in §13-98 have proven effective in minimizing invidious discrimination within the City of Aspen for over 16 years. (VII:149.) The enactment of §13-98 has not been followed by the subsequent passage of local legislation calling for quotas or affirmative action on behalf of homosexuals, lesbians or bisexuals. (VII:156.) Instead, Aspen has chosen and successfully utilized a system of mediation to resolve discrimination complaints.[4] As demonstrated before the

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[3] References are to volume and page number of the nineteen volume main record as compiled in the trial court.

[4] Despite the existence and operation of the anti-discrimination ordinance for over 16 years, petitioners were unable to offer any evidence at the trial verifying or illustrating that Aspen's prohibition against discrimination on the basis of sexual orientation has at any time been enforced or utilized in such a way to prevent the exercise of religious liberty, compel individuals to compromise their religious beliefs, corrupt the moral values of children, or invade the bona fide employment practices of any religious organization. Moreover, these allegations

trial court, those efforts have not diminished or interfered with the city's ability to address other types of invidious discrimination and have, furthermore, advanced Aspen's public policy goals of affording all persons equal access to basic services and the means to support themselves and their families. (XV:707:14-15.)[5]

The trial court found that homosexuals have suffered a history of discrimination, (Pet. App. at C-17 to C-18), and that the preponderance of credible evidence suggested that a person's sexual orientation results from a biological or genetic "component." (Pet. App. at C-17.) These findings are not unusual or unique, for other courts that have carefully examined these matters have come to the same conclusion. *Compare, Watkins v. U.S. Army*, 875 F.2d 699, 726-27 (9th Cir. 1989) (Norris, J., concurring) (pervasive

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as suggested by petitioners (see pages 44-46 of petitioners' brief) reflect "as applied" challenges to the ordinance that may only be raised in the context of an actual case or controversy. In the event of a successful challenge, a limiting construction of the ordinance rather than a facial invalidation would be all that is called for. *See Burson v. Freeman*, 504 U.S. 191, 210 n.13 (1992). In the absence of any factual record upon which to support a claim that Aspen's ordinance has been applied to create the results or circumstances described by petitioners, petitioners' attack on the validity of the ordinance calls for speculation and should not be entertained. *Tennessee Publishing Company v. American National Bank*, 299 U.S. 18, 22 (1936) ("[i]t is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it"); *Allen-Bradley Local No. 1111, Etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942) (courts are not to assume in advance that a law will be construed as to bring it into conflict with the Federal Constitution).

[5] Affidavit of Mayor John S. Bennett, pages 2-3.

discrimination and immutable characteristic) *with High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1988) (homosexuals have suffered a history of discrimination, but homosexuality not an immutable characteristic); *see also Equality Foundation of Cincinnati v. Cincinnati*, 860 F.Supp. 417, 437 (S.D. Ohio 1994), *rev'd on other grounds*, Nos. 95-3855/3973/4280, 1995 WL 276248 (6th Cir. 1995) (history of invidious discrimination and immutable characteristic); *Rowland v. Mad River Local School District*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of *cert.*) (homosexuals have historically been the object of pernicious and sustained hostility as the likely result of deep-seated prejudice rather than rationality); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law and Sexuality 133, 148-52 (1991); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv.L.Rev. 1285, 1303 (1985); Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S.Cal.L.Rev. 797, 824-25 (1984).[6] The evidence below also established that homosexuals are viewed with unsurpassed disdain and hostility by the population at large. (XV:562-63 and XVI:911-12.)[7]

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[6] The Federal Government may itself be the most prominent practitioner of systematic discrimination against homosexual citizens. *See Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Cammermyer v. Aspin*, 880 F.Supp. 910 (W.D. Wash. 1994).

[7] University of Michigan Institute for Social Survey Research.

Summary of Argument

As described by its originators and promoters, Amendment 2 was initiated to fend off "militant gay aggression" and foreclose government from providing homosexuals "protected class status." (Pet. App. C-7 and XV:839, 842-45 and 853.)[8] Pursuant thereto, Amendment 2 was designed to dilute and lessen the ability of homosexuals to participate in Colorado's political system.[9] While the immediate aim of Amendment 2 is to eliminate all existing legal protections shielding homosexuals from discrimination, its ultimate and more important objective is to alter the traditional processes of government so as to permanently limit and prevent the enactment of any future anti-discrimination measures on behalf of homosexuals absent the consent of a state-wide majority. This prohibition is to be uniformily applied regardless of the locale, severity or extent of the discrimination and its impact on homosexual citizens, or upon the general welfare of the public as a whole.

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[8] "It was necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease . . . And so the only way to ensure that this kind of activity would stop would be through passage of a constitutional amendment." Mr. Tony Marco, founder of Colorado for Family Values. (XV:839.)

[9] "Amendment 2 *sought* to deny an independently identifiable group's right to participate equally in the political process." *Evans II*, 882 P.2d at 1349 (emphasis added).

Under Amendment 2, homosexuals[10] are foreclosed from seeking or obtaining anti-discrimination protections from their local elected representatives and governmental entities while every other person or class of persons may do so. Likewise, under Amendment 2 homosexuals are foreclosed from seeking or obtaining anti-discrimination protections from their state-elected representatives and legislature, while every other person or class of persons may do so. Finally, under Amendment 2 homosexuals are foreclosed from directly initiating the enactment of anti-discrimination legislation through the citizen-initiative processes guaranteed to citizens under the Colorado Constitution[11] and charters of home rule municipalities,[12] while every other person or class of persons may do so. Hence, Amendment 2 uniquely and purposefully alters the system of government in Colorado for one and only one purpose – to deny homosexuals legal protection from

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[10] For ease of reference and economy, the term "homosexual(s)" shall be used in this brief as shorthand for "homosexuals, bisexuals and lesbians."

[11] Article V, §1(2) of the Colorado Constitution provides in relevant part that "[t]he first power hereby reserved by the people is the initiative . . . " Article V, §1(9) mandates that the initiative power is further "reserved to the registered electors of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities."

[12] Article V, Section 5.1(a) of the Home Rule Charter for the City of Aspen provides, in part, that "[t]he electors of the City shall have power to propose any ordinance to the council in accordance with the provisions of this article of the Charter . . . In the event council fails to adopt said proposed ordinance . . . the said proposed ordinance shall be submitted to the electors for their acceptance or rejection."

discrimination. No historical precedent exists in Colorado for such an oppressive measure.

"The Framers of the Constitution knew, and we should not forget today that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). "A citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring). Because Amendment 2 unequivocally impairs the substantive right and liberty conferred on all citizens by the Constitution to participate on an equal basis in the processes of government, the Colorado Supreme Court properly invalidated the measure.

ARGUMENT

THE COLORADO SUPREME COURT CORRECTLY DETERMINED THAT AMENDMENT 2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

I. The Right Of Citizens To Participate Equally In The Processes Of Government Is A Core Democratic Value And Fundamental Right.

Fundamental rights are those that are "explicitly or implicitly guaranteed by the Constitution," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973), or "deeply rooted in this Nation's history and traditions," *Moore v. City of East Cleveland*, 431 U.S. 494, 803 (1977), or "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1973).

From the earliest days of our Nation's history it was recognized that "[t]o all general purposes we have uniformly been one people, each individual citizen everywhere enjoying the same national rights, privileges, and protection." The Federalist No. 2, at 38-39 (J. Jay) (C. Rossiter ed. 1961). Hence, one of the central issues of debate during the drafting and ratification of the Constitution was the potential for varying factions operating under the new American political system to subvert or manipulate the processes of government to the disadvantage and injury of specific individuals or minority groups of citizens. "Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflict of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." The Federalist No. 10, at 77 (J. Madison), *supra*. While a minority might "clog the administration, . . . [and] may convulse the society, . . . " *id.* at 80, it was the threat of majoritarian excesses that most concerned the Framers. "A common passion or interest will, in almost every case, be felt by a majority of the

whole; a communication and concert results from the form of government itself; and there is nothing to check the inducement to sacrifice the weaker party or an obnoxious individual." *Id.* at 81. "When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." *Id.* at 80. "[N]either moral nor religious motives can be relied on as an adequate control." *Id.* at 81.[13]

Given the inherent advantage and power of majorities, American constitutional jurisprudence has long recognized the fundamental importance of equal representation and a "level playing field" in the meaningful and fair operation of our governmental processes.

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[13] As demonstrated by the text above, and taking into consideration the context of the time during which it was originally written and debated, terms such as "minority," "minor party" or "minority interests" were not directed at, nor intended to be limited to, persons or groups that are today recognized as "suspect classes." *See Davis v. Bandemer*, 478 U.S. 109, 131 n.12 (1986) (like racial gerrymandering, political gerrymandering and political fairness subject to constitutional scrutiny); *Avery v. Midland County, Texas*, 390 U.S. 474, 481 (1968) ("Government – National, State, and local – must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment.").

"[E]very citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). The presumption underlying the Constitution that improvident decisions will eventually be rectified by the democratic process, *Vance v. Bradley*, 440 U.S. 93, 97 (1979), can only be sustained if that process is equally available to all. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("fencing out" from the franchise a sector of the population because of the way it may vote is constitutionally impermissible). If a system of government is to be fair, one group cannot always be expected to win. *Hunter v. Erickson*, 393 U.S. 385, 394 (1969) (Harlan, J., concurring). Governmental processes must be designed with the "aim of providing a just framework within which the diverse political groups in our society may fairly compete." *Id.* at 393. Accordingly, allocations of governmental power must be distributed neutrally on the basis of general principles. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982) (citing *Hunter*, 393 U.S. at 395). "The theme of the Constitution is equality among citizens in the exercise of their political rights," and "while the Constitution itself may sanction certain inequalities in some aspects of the political system, that does not justify the state in creating additional ones." *MacDougall v. Green*, 335 U.S. 281, 289-90 (1948) (Douglas, J., dissenting). These general constitutional principles and commands ensure that citizens will have an effective voice in governmental affairs which substantially affect their lives. *See Kramer v. Union Free School District*, 395 U.S. 621, 626-27 (1969).

The existence and fountainhead nature of the right to equally participate in the political processes of government are best illustrated in those decisions of the Supreme Court wherein attempts to restrict or condition the exercise of the right have been invalidated. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (ballot access requirements); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (burdensome residency requirements); *Kramer v. Union Free School District, supra* (property qualifications); *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (poll tax); *Carrington v. Rash, supra* (occupation discrimination); *Nixon v. Herndon*, 273 U.S. 536 (1927) (race qualifications). Likewise, the right has implicitly surfaced in those cases where a political process or structure has been established or manipulated to dilute effective citizen participation, or disadvantage a minority group. *Reynolds v. Sims, supra* (vote dilution); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Hunter v. Erickson, supra;* and *Washington v. Seattle School District No. 1, supra* (structural manipulation disadvantaging minority).

As properly concluded by the state court, the decisions of the United States Supreme Court have steadfastly recognized the fundamental importance of fair and accessible political processes to our system of government and a corresponding "inalienable right" to full and equal participation therein. *Reynolds v. Sims*, 377 U.S. at 565. A rejection of the fundamental nature of the right to participate equally in the processes of government would defeat liberty and sacrifice justice.

II. Amendment 2 Intentionally Tramples Upon the Right of Homosexuals To Access And Participate In The Political Processes Of Government On An Equal Basis With Other Citizens.

Prior to the passage of Amendment 2, any individual citizen or group of citizens subjected to invidious discrimination could access the systems and processes of government at either the state or local level and petition their elected representatives for legislation or other legal protection prohibiting such harmful conduct. Many Colorado citizens did. Some of those efforts were successful while others were not. *See and compare, e.g.*, Colo. Rev. Stat. §§24-34-402, 502 and 601 (1994 Cum. Supp.) (prohibiting discrimination in employment, housing and public accommodations on the basis of disability, race, creed, color, sex, marital status (housing and public accommodations only), national origin, ancestry, age (employment only), familial status (housing only), religion (housing only)); *see also* Aspen, Colo. Mun. Code §13-98 (1977). After the passage of Amendment 2, all individual citizens or groups of citizens may continue to rely on the regular processes of government as they deem necessary for purposes of seeking anti-discrimination protections, *except homosexuals*.[14] As a result of Amendment 2, the

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[14] As one commentator has recently described, classical eighteenth-century constitutional doctrine studied by the Framers specifically included a "right to protection." The advocates of the Constitution argued, among other things, that citizens would enjoy greater security under the Constitution than under the Articles of Confederation. Protection was not only to be afforded from external threats and foreign invasion, but from "domestic Violence." U.S. Const., art. IV, §4; *see also* Steven J.

Colorado Constitution will provide: "No person who is a homosexual may apply for or obtain protection from invidious discrimination without first securing the approval of a majority of the electorate at a statewide election, but everyone else may." *E.g., Esmail v. Macrane*, No. 94-3285, 63 U.S.L.W. 2658, 2659 (7th Cir. Apr. 19, 1995).

Amendment 2 makes no attempt to allocate the tools of government in an impartial manner, or further a general principle fairly applicable to all citizens. Like the measures in *Hunter* and *Washington v. Seattle School District No. 1*, Amendment 2 simply has the purpose of permanently subjecting the political aspirations and legal needs of a minority class of citizens to the raw power and numerical strength of a state-wide majority. However, as stated in *Hunter*, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's

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Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507, 524-25 (1991) (discussing relationship of National government to States). The classical tradition identifies liberty with protection. Individuals originally entered into society and consented to government to secure their rights against private violence. *Id.* at 532-33. The southern States' failure to protect blacks from discrimination at the hands of whites was the central reason for the adoption of the Fourteenth Amendment and protective Federal civil rights legislation. It has been argued that in establishing and declaring a Federal right to protection, the Fourteenth Amendment did no more than recognize and incorporate into the Constitution the concept of protection as understood in the classical tradition by the Framers. *Id.* at 546. This right to protection is shared equally by all citizens. *Id.* at 554-66.

vote or give any group a smaller representation than another of comparable size." *Hunter v. Erickson*, 393 U.S. at 393; *see also Harris v. McRae*, 448 U.S. 297, 322 n.25 (1980) (if a State adopts an electoral system, the Equal Protection Clause confers upon a qualified voter the substantive right to participate in the electoral process equally with other qualified voters). To allow otherwise would dilute and threaten the fundamental principles of fairness and equal opportunity that distinguish the American system of government from most every other system in the world. *Washington v. Seattle School District No. 1*, 485 U.S. at 470 (political majority may generally restructure the political process to place obstacles in the path of persons or groups seeking governmental action so long as such obstacles are placed in the path of everyone).

III. Amendment 2 Violates The Equal Protection Clause Of The Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall deny to any person within its jurisdiction the equal protection of the law and mandates that all persons similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). It does not make some groups of citizens "more equal than others." *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (Brennan, J., concurring). The safeguards provided under the Equal Protection Clause apply to all citizens, not just those that comprise "suspect classes." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In determining what classifications may be unconstitutionally discriminatory, the Court has never been

unalterably anchored to fixed concepts of equality. *Harper v. Virginia State Board of Elections*, 383 U.S. at 669.[15]

Given its recognition of the fundamental right of citizens to participate equally in the political process, the Colorado Supreme Court subjected Amendment 2 to strict judicial scrutiny and required the State to demonstrate that the classifications drawn in the measure were precisely tailored to advance a compelling governmental interest. *See Plyler v. Doe*, 457 U.S. 202, 217 (1982). The court found none of the interests put forward by the State in defense of Amendment 2 compelling, much less precisely tailored in support of those interests. (Pet. App. B-8 n.5.)

The State argues that the courts below erred in applying strict scrutiny in determining Amendment 2's constitutional sufficiency because 1) no fundamental right is

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[15] "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear." *Harper*, 383 U.S. at 669 (emphasis in original). In footnote 6 of the *Harper* decision, the Court provided an example of such an expression: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. 163 U.S. 669."

invaded by Amendment 2, and 2) it is perfectly permissible under the Equal Protection Clause of the Fourteenth Amendment for the State to discriminate against discrete minorities in the structure and operation of political processes so long as such discrimination is not drawn along racial lines. *But see United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (prejudice against discrete and insular minorities may be a special condition calling for more searching judicial inquiry).

As discussed above, the right to participate equally in the basic public political processes under which our system of government operates is fundamental and implicitly guaranteed by the Constitution. As Justice Blackmun wrote in support of the ruling in *Plyler v. Doe*, "a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler*, 457 U.S. at 233. Those denied that right would be relegated in a most basic way to second-class status. *Id.* Furthermore, and contrary to the claims as put forth by the State, the right to participate on an equal basis in our system of government is not reserved to any one group, and is not limited in its exercise or protection to racial minorities or "suspect" classes. "[T]he State may no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute *any person's* vote. . . . " *Hunter v. Erickson*, 393 U.S. at 393 (emphasis added); *see also Gordon v. Lance*, 403 U.S. 1, 7 (1971) (so long as election provisions do not discriminate against or authorize discrimination against an *identifiable class*, they do not violate the Equal

Protection Clause).[16] Intentionally structuring or restructuring the shape and process of government for the

[16] The State's reliance on the Court's decision in *James v. Valtierra*, 402 U.S. 137 (1971) to justify the exclusion of homosexuals, and potentially all unpopular minorities not defined by race or other non-suspect characterization, from equal participation in the political processes of government is misdirected. The constitutional amendment at issue in *James* did not specifically name or target an independently identifiable group for unfair treatment, i.e., "independently identifiable" in the sense that the existence and identity of the persons comprising the group, and the group itself, can be readily defined apart from the particular political issue placed before the electorate. Moreover, the ballot question in *James* addressed the public financing of low-rent housing and was not intended or imposed to diminish the political rights of those persons in favor of public housing, or permanently exclude a class of persons from the protection of the law. *See also Gordon v. Lance*, 403 U.S. at 5 ("we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing").

The contention that the Colorado Supreme Court's holding is without limits is also not well-grounded. The scenerios posited by the State fail to recognize that unlike Amendment 2, the prohibitions imposed under the various examples applied equally to all persons on both sides of the given subject. For instance, while Colorado's ban on public funding for abortions clearly disadvantages women who cannot obtain the medical procedure absent financial assistance, the ban applies to all women. Amendment 2, on the otherhand, does not equally prohibit the enactment of anti-discrimination measures absent a constitutional amendment for everyone, just homosexuals. The mechanisms with which to achieve anti-discrimination protections via the political processes of government have not been neutrally distributed under Amendment 2. *See Hunter*, 393 U.S. at 392-93; *Washington v. Seattle School District No. 1*, 458 U.S. at 476-77. Rather, the political process has been altered for the sole

purpose of excluding or diluting the equal participation and effectiveness of a targeted political minority is no less offensive to the Equal Protection Clause than if the manipulations had been carried out in order to disable a racial minority. *Davis v. Bandemer*, 478 U.S. 109, 125, 132-33 (1986) (pluralty opinion) (actual denial of chance to effectively influence political process as result of intentional discrimination against an *identifiable political group* violates equal protection) (emphasis added).[17]

purpose of disadvantaging homosexuals. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv.L.Rev. 1905, 1918 (1993).

[17] While the contention that Amendment 2 impermissibly invades protected privileges and immunities was not expressly presented before the Colorado Supreme Court, the Aspen respondents endorse and adopt Justice Scott's concurring opinion finding that Amendment 2 violates the Privileges or Immunities Clause of the Fourteenth Amendment. Although not unmindful of the "numerous unsuccessful efforts to give the clause application," *Colgate v. Harvey*, 296 U.S. 404, 431-32 (1935), "there are privileges and immunities . . . ; otherwise it would be nonsense for the 14th Amendment to prohibit a state from abridging them." *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138 (1873).

Privileges and immunities entail those rights that are fundamental and "belong of right to citizens of all free governments." *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 75 (1872). There is no fixed catalogue of privileges or immunities and the Court has earlier decreed that it would be excused from explicitly defining them "until some case involving those privileges may make it necessary to do so." *Id.* at 78-79. Amendment 2 presents such a case.

A right to participate on an equal basis in the processes of government has been consistently reflected in the numerous political participation cases that have previously come before the Supreme Court. (*See* Sections I-III above.) This right is inclu-

IV. Amendment 2 Is Not Rationally Related To Any Legitimate Governmental Interest.

Whether or not Amendment 2 is rationally connected to and supported by a legitimate governmental purpose was left undetermined by the Colorado courts. To the extent the issue is now before this Court, the Aspen respondents adopt and incorporate herein the brief of their co-respondents. The Aspen respondents would add, however, that it can hardly be argued rationally that any legitimate public purpose is served, or anyone benefited, by the christening of a new class of "untouchables," one openly sanctioned by law and perpetuated by its inability to obtain legal protection or relief from invidious discrimination. *See Plyler v. Doe,* 457 U.S. 202, 241 (1982) (Powell, J., concurring). Our Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163

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sive of the right to petition for redress of grievances. Like the other more particularized rights that together comprise and enforce the right to participate equally in the political process, the right to petition is among the most precious of liberties, *United Mine Workers of America v. Illinois State Bar Association,* 389 U.S. 217, 222 (1967), and it is equally extensive and enforceable with respect to matters of local concern as to matters of federal concern. *Id.* at 224 n.9. As a fundamental right, it is not dependent upon the positive laws or protections of any State, for it springs from the very essence of the republican form of government established under the Constitution.

Amendment 2 directly invades and reduces the right of homosexuals to petition their government for redress of grievances, and eliminates it altogether at the state and local legislative levels. Because it does so, Amendment 2 unconstitutionally burdens the exercise of a fundamental right inherently vested in citizens of the United States and violates the Privileges or Immunities Clause of the Fourteenth Amendment.

U.S. 537, 559 (1896) (Harlan, J., dissenting). "In respect to civil rights, all citizens are equal before the law." *Id.*

CONCLUSION

If allowed to become law, Amendment 2 will extinguish all legal protections currently in place within the City of Aspen and the state of Colorado adopted to insure that homosexuals have a fair opportunity to hold a job, secure a decent place to live, and receive public services on an equal basis with other citizens. It will also effectively cast homosexuals out of the halls of state and local government by requiring them, and their duly elected representatives, to seek approval from a state-wide majority prior to securing protection from discrimination. Arguably, the City of Aspen and its City Council will not even be able to restrict or control the discriminatory conduct of their own employees in the delivery of services to Aspen citizens should the need present itself. To say that Amendment 2 does not impose any "special burdens" on homosexual citizens in securing legislative or other legal relief from invidious discrimination simply ignores the plain language and intent of the enactment.

One *amicus curiae* participating in this matter has suggested that by approving Amendment 2, Colorado voters, exercising their rights as "We, the People," did nothing more than make a "final decision" regarding the granting of alleged "special protected status to homosexuals."[18] Respondents disagree and respectfully suggest

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[18] Brief of Equal Rights, Not Special Rights, Inc., in support of petitioners, page 11.

that when a political majority, through the raw power of its numbers, undertakes to restructure the process of government so as to create two paths over which citizens must travel to obtain relief from invidious discrimination; one path for one group of citizens and another, more accommodating path, for the majority and such other groups as *it* may select, it immediately and inevitably creates class distinctions of the type fundamentally at odds with the goals and intent of our form of government and the Equal Protection Clause. Amendment 2 directly attacks and does violence to the notion that we have uniformly been one people, each individual everywhere enjoying the same national rights, privileges, and protections. U.S. Const. amend. XIV, §1. As expressed by Justices Powell and Blackmun in the *Plyler* case, a legislative classification that threatens the creation of an underclass cannot be reconciled with the purposes of the Fourteenth Amendment.

The judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted this 19th day of June, 1995.

EDWARD M. CASWALL*
Special Counsel

1600 Broadway, Suite 2350
Denver, CO 80202-4923
Telephone: 303-894-8191

JOHN P. WORCESTER
City Attorney
City of Aspen
130 South Galena Street
Aspen, Colorado 81612
Telephone: 970-920-5055

Attorneys for Respondents
City of Aspen and
City Council of Aspen

*Counsel of Record